

**CSDD- ecoDa proposed amendments –** Up.11 July 2022

**Pending questions :**

* Shall we require that the directive focus mainly on contractual established business relationship (with would include succession of contracts) or shall we require an extension of the entry into force for the indirect business relationship (phing approach) ? Or keep the text as it is ? (EFRAG standards are referring to the same terminology).
* Implication or not of SMEs ?– see rationale 21
* Deletion or not of article 25 ?
* Thresholds and explanations for non-EU companies ?
* Keeping a dedicated article on remuneration while deleting reference to the limiting of global warming to 1.5 °C in line with the Paris Agreement;
* Should ecoDa comment the list of norms/agreements companies will have to comply with? Keeping in mind that they are government-to-government defined and that some might not be applicable to/relevant for companies.

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| **Initial text** | **Suggested amendments** | **Explanations** |
| ***All the text*** | | |
|  | ***Replacement of value chain by supply chain.*** | *Keeping the terminology of value chains would create confusion regarding the scope of responsibility encountered by the companies concerned furthermore that most international texts to which the draft directive refers in its annex concern supply chains.*  *Value addition emphasizes innovation, testing, marketing and sales of a product – which does not really appear here.* |
| ***Rationale 15*** | | |
| Companies should take appropriate steps to set up and carry out due diligence measures, with respect to their own operations, their subsidiaries, as well as their established direct and indirect business relationships throughout their value chains in accordance with the provisions of this Directive. This Directive should not require companies to guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped. For example with respect to business relationships where the adverse impact results from State intervention, the company might not be in a position to arrive at such results. Therefore, the main obligations in this Directive should be ‘obligations of means’. The company should take the appropriate measures which can reasonably be expected to result in prevention or minimisation of the adverse impact under the circumstances of the specific case. Account should be taken of the specificities of the company’s value chain, sector or geographical area in which its value chain partners operate, the company’s power to influence its direct and indirect business relationships, and whether the company could increase its power of influence. | Companies should take appropriate steps to set up and carry out due diligence measures, with respect to their own operations, their subsidiaries, as well as their established **direct** business relationships throughout their value chains in accordance with the provisions of this Directive. This Directive should not require companies to guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped. For example with respect to business relationships where the adverse impact results from State intervention, the company might not be in a position to arrive at such results. Therefore, the main obligations in this Directive should be ‘obligations of means’. The company should take the appropriate measures which can reasonably be expected to result in prevention or minimisation of the adverse impact under the circumstances of the specific case. Account should be taken of the specificities of the company’s **supply** chain, sector or geographical area in which its **supply** chain partners operate, the company’s power to influence its direct and indirect business relationships, and whether the company could increase its power of influence. |  |
| ***Rationale 20*** | | |
| In order to allow companies to properly identify the adverse impacts in their value chain and to make it possible for them to exercise appropriate leverage, the due diligence obligations should be limited in this Directive to established business relationships. For the purpose of this Directive, established business relationships should mean such direct and indirect business relationships which are, or which are expected to be lasting, in view of their intensity and duration and which do not represent a negligible or ancillary part of the value chain. The nature of business relationships as “established” should be reassessed periodically, and at least every 12 months. If the direct business relationship of a company is established, then all linked indirect business relationships should also be considered as established regarding that company. | In order to allow companies to properly identify the adverse impacts in their value chain and to make it possible for them to exercise appropriate leverage, the due diligence obligations should be limited in this Directive to **contractual** established business relationships. For the purpose of this Directive, established business relationships should mean ***a sufficiently established, prolonged, regular, stable and significant contractual relationship.***  The nature of business relationships as “established” should be reassessed periodically, and at least every 12 months. ***(Deletion : If the direct business relationship of a company is established, then all linked indirect business relationships should also be considered as established regarding that company).*** | *The commercial relationship established may be upheld by the courts, including when it is based on tacit agreements. Therefore, it is important to refer to contractual established business relationships.*  *The contractual established business relationships* *may however involve a succession of contracts.*  *The wording would be more consistent with rationale 34 and 35 for instance.* |
| ***Rationale 21*** | | |
| Under this Directive, EU companies with more than 500 employees on average and a worldwide net turnover exceeding EUR 150 million in the financial year preceding the last financial year should be required to comply with due diligence. As regards companies which do not fulfil those criteria, but which had more than 250 employees on average and more than EUR 40 million worldwide net turnover in the financial year preceding the last financial year and which operate in one or more high-impact sectors, due diligence should apply 2 years after the end of the transposition period of this directive, in order to provide for a longer adaptation period. In order to ensure a proportionate burden, companies operating in such high-impact sectors should be required to comply with more targeted due diligence focusing on severe adverse impacts. Temporary agency workers, including those posted under Article 1(3), point (c), of Directive 96/71/EC, as amended by Directive 2018/957/EU of the European Parliament and of the Council[[1]](#footnote-0), should be included in the calculation of the number of employees in the user company. Posted workers under Article 1(3), points (a) and (b), of Directive 96/71/EC, as amended by Directive 2018/957/EU, should only be included in the calculation of the number of employees of the sending company. | ***Deletion*** ??? | *This effort to involve SMEs at all costs will result in a very complicated set-up of rules and a disproportionate bureaucratic burden for the companies. One cannot see how regulators will be able to monitor it, and activist NGOs (who are the real regulators in these matters) will likely not be interested in what does not promise wide mediatic attention - ????* |
| ***Rationale 23*** | | |
| In order to achieve fully the objectives of this Directive addressing human rights and adverse environmental impacts with respect to companies’ operations, subsidiaries and value chains, third-country companies with significant operations in the EU should also be covered. More specifically, the Directive should apply to third-country companies which generated a net turnover of at least EUR 150 million in the Union in the financial year preceding the last financial year or a net turnover of more than EUR 40 million but less than EUR 150 million in the financial year preceding the last financial year in one or more of the high-impact sectors, as of 2 years after the end of the transposition period of this Directive. | In order to achieve fully the objectives of this Directive addressing human rights and adverse environmental impacts with respect to companies’ operations, subsidiaries and value chains, third-country companies with significant operations in the EU should also be covered. More specifically, the Directive should apply to third-country companies which generated a net turnover of at least EUR 100 million in the Union in the financial year preceding the last financial year or a net turnover of more than EUR 30 million but less than EUR 150 million in the financial year preceding the last financial year in one or more of the high-impact sectors, as of 2 years after the end of the transposition period of this Directive. | *By applying the same thresholds as for European companies, the draft directive will in fact apply to larger non-EU companies as most of them will not operate only in the European market.* |
| ***Rationale 28*** | | |
| (…) The code of conduct should apply in all relevant corporate functions and operations, including procurement and purchasing decisions. Companies should also update their due diligence policy annually. | (…) The code of conduct should apply in all relevant corporate functions and operations, including procurement and purchasing decisions. Companies should also update ***when they change their operational strategy or at least every two years.*** | *Unnecessarily burdensome to have a yearly review while a yearly assessment makes sense.* |
| ***Rationale 30*** | | |
| (…) Identification of adverse impacts should include assessing the human rights, and environmental context in a dynamic way and in regular intervals: prior to a new activity or relationship, prior to major decisions or changes in the operation; in response to or anticipation of changes in the operating environment; and periodically, at least every 12 months, throughout the life of an activity or relationship.(…) | (…) Identification of adverse impacts should include assessing the human rights, and environmental context in a dynamic way and in regular intervals: prior to a new activity or relationship, prior to major decisions or changes in the operation; in response to or anticipation of changes in the operating environment; and periodically, **at least every two years**, throughout the life of an activity or relationship.(…) | *idem* |
| ***Rationale 32*** | | |
| In line with international standards, prevention and mitigation as well as bringing to an end and minimisation of adverse impacts should take into account the interests of those adversely impacted. In order to enable continuous engagement with the value chain business partner instead of termination of business relations (disengagement) and possibly exacerbating adverse impacts, this Directive should ensure that disengagement is a last-resort action, in line with the Union`s policy of zero-tolerance on child labour. Terminating a business relationship in which child labour was found could expose the child to even more severe adverse human rights impacts. This should therefore be taken into account when deciding on the appropriate action to take. | ***Deletion*** | *This provision is wishful thinking and makes no sense in a legal text. However, it demonstrates the awareness of the European Commission of a significant risk of disengagement which can have disastrous consequences for the local economy but which can also have significant geopolitical consequences for the European Union.* |
| ***Rationale 45*** | | |
| In order to facilitate companies’ compliance with their due diligence requirements through their value chain and limiting shifting compliance burden on SME business partners, the Commission should provide guidance on model contractual clauses. | In order to facilitate companies’ compliance with their due diligence requirements through their value chain and limiting shifting compliance burden on SME business partners, the Commission should provide guidance on model contractual clauses ***as well as a budget for education programmes especially at boards’ level.*** |  |
| ***Rationale 48*** | | |
| In order to complement Member State support to SMEs, the Commission may build on existing EU tools, projects and other actions helping with the due diligence implementation in the EU and in third countries. It may set up new support measures that provide help to companies, including SMEs on due diligence requirements, including an observatory for value chain transparency and the facilitation of joint stakeholder initiatives. | In order to complement Member State support to SMEs, the Commission may build on existing EU tools, projects and other actions helping with the due diligence implementation in the EU and in third countries. It may set up new support measures that provide help to companies, including SMEs on due diligence requirements, including an observatory for value chain transparency ***(Deletion: and the facilitation of joint stakeholder initiatives).*** | *Is it really the role of the European regulator? It should be left to European associations of consumers, workers, etc.*  *It goes far beyond the remit of the European Commission.* |
| ***Rationale 50*** | | |
| In order to ensure that this Directive effectively contributes to combating climate change, companies should adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. In case climate is or should have been identified as a principal risk for or a principal impact of the company’s operations, the company should include emissions reduction objectives in its plan. | In order to ensure that this Directive effectively contributes to combating climate change, companies should adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy (***Deletion:*** ***and with the limiting of global warming to 1.5 °C in line with the Paris Agreement)***. In case climate is or should have been identified as a principal risk for or a principal impact of the company’s operations, the company should include emissions reduction objectives in its plan. | *The European Commission should refrain from imposing that business models and strategies are compatible with the limiting of global warming to 1.5°C, in line with the Paris Agreement.*  *By doing so, the European Commission will force European companies to relocate their supply chains in Europe.*  *Flexibility should be granted to companies so they can define relevant sustainability targets based on their sector, size, business model, strategy, countries of operations...* |
| ***Rationale 51*** | | |
| With a view to ensure that such emission reduction plan is properly implemented and embedded in the financial incentives of directors, the plan should be duly taken into account when setting directors’ variable remuneration, if variable remuneration is linked to the contribution of a director to the company’s business strategy and long-term interests and sustainability. | With a view to ensure that such emission reduction plan is properly implemented and embedded in the financial incentives of ***executive directors*,** the plan should be duly taken into account when setting directors’ variable remuneration, if variable remuneration is linked to the contribution of a director to the company’s business strategy and long-term interests and sustainability. | *The European Commission tends to confuse the management and the board.* |
| ***Rationale 64*** | | |
| Responsibility for due diligence should be assigned to the company’s directors, in line with the international due diligence frameworks. Directors should therefore be responsible for putting in place and overseeing the due diligence actions as laid down in this Directive and for adopting the company’s due diligence policy, taking into account the input of stakeholders and civil society organisations and integrating due diligence into corporate management systems. Directors should also adapt the corporate strategy to actual and potential impacts identified and any due diligence measures taken. | Responsibility for due diligence should be assigned to the company’s ***board***, in line with the international due diligence frameworks. *The* ***board*** should therefore be responsible (deletion: for putting in place)and overseeing the due diligence actions as laid down in this Directive and for adopting the company’s due diligence policy, taking into account the input of ***relevant*** stakeholders and civil society organisations and integrating due diligence into corporate management systems. ***The board*** should also adapt the corporate strategy to actual and potential impacts identified and any due diligence measures taken. | *The European Commission tends to confuse the management and the board.* |
| ***Rationale 64*** | | |
| Responsibility for due diligence should be assigned to the company’s directors, in line with the international due diligence frameworks. Directors should therefore be responsible for putting in place and overseeing the due diligence actions as laid down in this Directive and for adopting the company’s due diligence policy, taking into account the input of stakeholders and civil society organisations and integrating due diligence into corporate management systems. Directors should also adapt the corporate strategy to actual and potential impacts identified and any due diligence measures taken. | Responsibility for due diligence should be assigned to the company’s directors, in line with the international due diligence frameworks. ***Executive directors*** should therefore be responsible for putting in place and ***board members should oversee*** the due diligence actions as laid down in this Directive and for adopting the company’s due diligence policy, taking into account the input of stakeholders and civil society organisations and integrating due diligence into corporate management systems. ***Board members*** should also adapt the corporate strategy to actual and potential impacts identified and any due diligence measures taken. |  |
| ***Article 1 paragraph 2*** | | |
| This Directive shall also apply to companies which are formed in accordance with the legislation of a third country, and fulfil one of the following conditions:  (a) generated a net turnover of more than EUR 150 million in the Union in the financial year preceding the last financial year;  (b) generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more of the sectors listed in paragraph 1, point (b). | This Directive shall also apply to companies which are formed in accordance with the legislation of a third country, and fulfil one of the following conditions:  (a) generated a net turnover of more than EUR 100 million in the Union in the financial year preceding the last financial year;  (b) generated a net turnover of more than EUR 30 million but not more than EUR 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more of the sectors listed in paragraph 1, point (b). | *The net turnover of EUR 150 million is taken worldwide for EU companies, while for non-EU companies the same amount of net turnover accounts for the part earned in the EU only.* |
| ***Article 3f*** | | |
| ‘established business relationship’ means a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain; | ‘established business relationship’ means a business relationship**, *possibly through* *a succession of contracts***, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the ***supply*** chain; | *The commercial relationship established may be upheld by the courts, including when it is based on tacit agreements. Therefore, it is important to refer to contractual established business relationships.* |
| ‘value chain’ means activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company. As regards companies within the meaning of point (a)(iv), ‘value chain’ with respect to the provision of these specific services shall only include the activities of the clients receiving such loan, credit, and other financial services and of other companies belonging to the same group whose activities are linked to the contract in question. The value chain of such regulated financial undertakings does not cover SMEs receiving loan, credit, financing, insurance or reinsurance of such entities; | ??? | *???* |
| ***Article 3n*** | | |
| ‘stakeholders’ means the company’s employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships; | ‘stakeholders’ means the company’s employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be ***directly*** affected by the products, services and operations of that company, its subsidiaries and its business relationships ***having adverse human rights and environmental impact;*** | *The fact that all natural and legal persons are entitled to submit concerns when they think that a company is failing to comply with the Directive will lead to time-consuming and endless justifications from the company and possibly even to US-style litigation.*  *All actions of entities having a business relationship with the main entity cannot be covered by the latter.* |
| ***Article 3p*** |  |  |
| ‘board of directors’ means the administrative or supervisory body responsible for supervising the executive management of the company, or, if no such body exists, the person or persons performing equivalent functions; | ‘board of directors’ means ***(Deletion: the administrative or)*** supervisory body responsible for supervising the executive management of the company, or, if no such body exists, the person or persons performing equivalent functions; |  |
| ***Article 4*** | | |
| Member States shall ensure that companies conduct human rights and environmental due diligence as laid down in Articles 5 to 11 (‘due diligence’) by carrying out the following actions (…) | Member States shall ensure that companies ***at group level*** conduct human rights and environmental due diligence as laid down in Articles 5 to 11 (‘due diligence’) by carrying out the following actions (…) | *The due diligence requirements should apply at the group level and not at the corporate level which would result in costly processes with each subsidiary being subjected to a specific review by local authority.* |
| ***Article 5*** | | |
| Member States shall ensure that companies integrate due diligence into all their corporate policies and have in place a due diligence policy. The due diligence policy shall contain all of the following (…)  Member States shall ensure that the companies update their due diligence policy annually. | Member States shall ensure that companies ***at group level*** integrate due diligence into all their corporate policies and have in place a due diligence policy. The due diligence policy shall contain all of the following (…)  Member States shall ensure that the companies update their due diligence policy ***when they change their operational strategy or at least every two years.*** | *The policy review exercise does not make sense every year except in case of suppliers’ change, new market developments, etc.* |
| ***Article 7 paragraph 2d*** | | |
| provide targeted and proportionate support for an SME with which the company has an established business relationship, where compliance with the code of conduct or the prevention action plan would jeopardise the viability of the SME. | provide targeted and proportionate support for an SME with which the company has an established business relationship, ***when possible.*** | *Difficult to ask the main entity to estimate the viability of the SME* |
| ***Article 7 paragraph 5*** | | |
| As regards potential adverse impacts within the meaning of paragraph 1 that could not be prevented or adequately mitigated by the measures in paragraphs 2, 3 and 4, the company shall be required to refrain from entering into new or extending existing relations with the partner in connection with or in the value chain of which the impact has arisen and shall, where the law governing their relations so entitles them to, take the following actions:  (a) temporarily suspend commercial relations with the partner in question, while pursuing prevention and minimisation efforts, if there is reasonable expectation that these efforts will succeed in the short-term;  (b) terminate the business relationship with respect to the activities concerned if the potential adverse impact is severe.  Member States shall provide for the availability of an option to terminate the business relationship in contracts governed by their laws. | ***Deletion*** | *Private law should prevail* |
| ***Article 8 paragraph 3b*** | | |
| where necessary due to the fact that the adverse impact cannot be immediately brought to an end, develop and implement a corrective action plan with reasonable and clearly defined timelines for action and qualitative and quantitative indicators for measuring improvement. Where relevant, the corrective action plan shall be developed in consultation with stakeholders; | where necessary due to the fact that the adverse impact cannot be immediately brought to an end, develop and implement a corrective action plan with reasonable and clearly defined timelines for action and qualitative and quantitative indicators for measuring improvement. Where relevant, the corrective action plan shall be developed in consultation with ***relevant*** stakeholders; |  |
| ***Article 9 paragraph 2*** | | |
| Member States shall ensure that the complaints may be submitted by:  (a) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact,  (b) trade unions and other workers’ representatives representing individuals working in the value chain concerned,  (c) civil society organisations active in the areas related to the value chain concerned. | Member States shall ensure that the complaints may be submitted by:  (a) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact,  (b) trade unions and other workers’ representatives representing individuals working in the value chain concerned,  (c) civil society organisations active in the areas related to the value chain concerned ***provided that the people they represent are directly affected or have reasonable grounds to believe that they might be affected by an adverse impact.*** |  |
| ***Article 15*** | | |
| Member States shall ensure that companies referred to in Article 2(1), point (a), and Article 2(2), point (a), shall adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. (…) | ***Deletion of the entire article*** | *Not clear how this requirement fits with a duty of due diligence* |
| ***Article 16 paragraph 2*** | | |
| Member States shall ensure that the name, address, electronic mail address and telephone number of the authorised representative is notified to a supervisory authority in the Member State where the authorised representative is domiciled or established. | *Member States shall ensure* ***that the company provide supervisory authority with access to the authorised representative.*** | *Not compliant with GDPR ?* |
| ***Article 18*** | | |
| Inspections shall be conducted in compliance with the national law of the Member State in which the inspection is carried out and with prior warning to the company, except where prior notification hinders the effectiveness of the inspection. Where, as part of its investigation, a supervisory authority wishes to carry out an inspection on the territory of a Member State other than its own, it shall seek assistance from the supervisory authority in that Member State pursuant to Article 21(2). | *???* | *Too heavy/ intrusive ??* |
| ***Article 18*** |  | *Member States shall ensure that the supervisory authorities have adequate powers and resources to impose sanctions, but how could this be monitored in third countries? Imposing the same requirements but not the same possible sanctions makes no sense.* |
| ***Article 22*** | | |
| Member States shall ensure that companies are liable for damages if: (a) they failed to comply with the obligations laid down in Articles 7 and 8 and; (b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage (...) | ***Deletion of the entire article*** | *The Commission's proposal creates a new type of legal framework for liability which deviates from the Member States’ national tort law regarding negligence and sufficient causation (as in Finland for example). In addition, this new legal framework lacks clarity to be efficiently implemented. Obligations are not defined with precise limits which makes the provision unpredictable both in terms of scope, level and type of responsibility/liability that will weigh on companies.*  *Another major worrying flaw is that the division of responsibilities between undertakings is not included in the proposal, which may result in a company being liable for damages not caused by its own actions, but by a supplier on which it does not have control nor influence.* |
|  |  | *To add possibility of appealing against a decision of the authority* |
|  | *Deletion* | *Companies cannot be held liable for damages that have been caused by suppliers on which they have no power/influence* |
| ***Article 25*** | | |
| 1. Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.  2. Member States shall ensure that their laws, regulations and administrative provisions providing for a breach of directors’ duties apply also to the provisions of this Article. | *Deletion* | *The proposal does not provide useful clarifications on the notion of directors’ duty of care.* *The articles do not provide any clarity on how directors should incorporate conflicting interests of stakeholders and sustainability aspects.*  *The confusion also comes from the fact that the companies referred to in article 2 would have a duty of care distinct from other types of companies or from certain sectors of activity, which makes no sense. This article also breaches the principle of subsidiarity by interfering with national company laws.* |
| ***Article 26*** | | |
| Member States shall ensure that directors of companies referred to in Article 2(1) are responsible for putting in place and overseeing the due diligence actions referred to in Article 4 and in particular the due diligence policy referred to in Article 5, with due consideration for relevant input from stakeholders and civil society organisations. The directors shall report to the board of directors in that respect. | *Member States shall ensure that* ***executive*** *directors of companies referred to in Article 2(1) are responsible for putting in place and* ***board members for*** *overseeing the due diligence actions referred to in Article 4 and in particular the due diligence policy referred to in Article 5.* ***(Deletion: with due consideration for relevant input from relevant stakeholders and civil society organisations. The directors shall report to the board of directors in that respect)*** | *Asking board members to take into consideration input from would lead to a split accountability of the directors to a range of different “masters”, typically with mutually more or less conflicting interest, a sure recipe for severely watered-down accountability: directors held to account for poor performance with regard to some stakeholder interests could always point at having given primacy to those of some other stakeholder(s).* |

1. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ L 173, 9.7.2018, p. 16). [↑](#footnote-ref-0)